

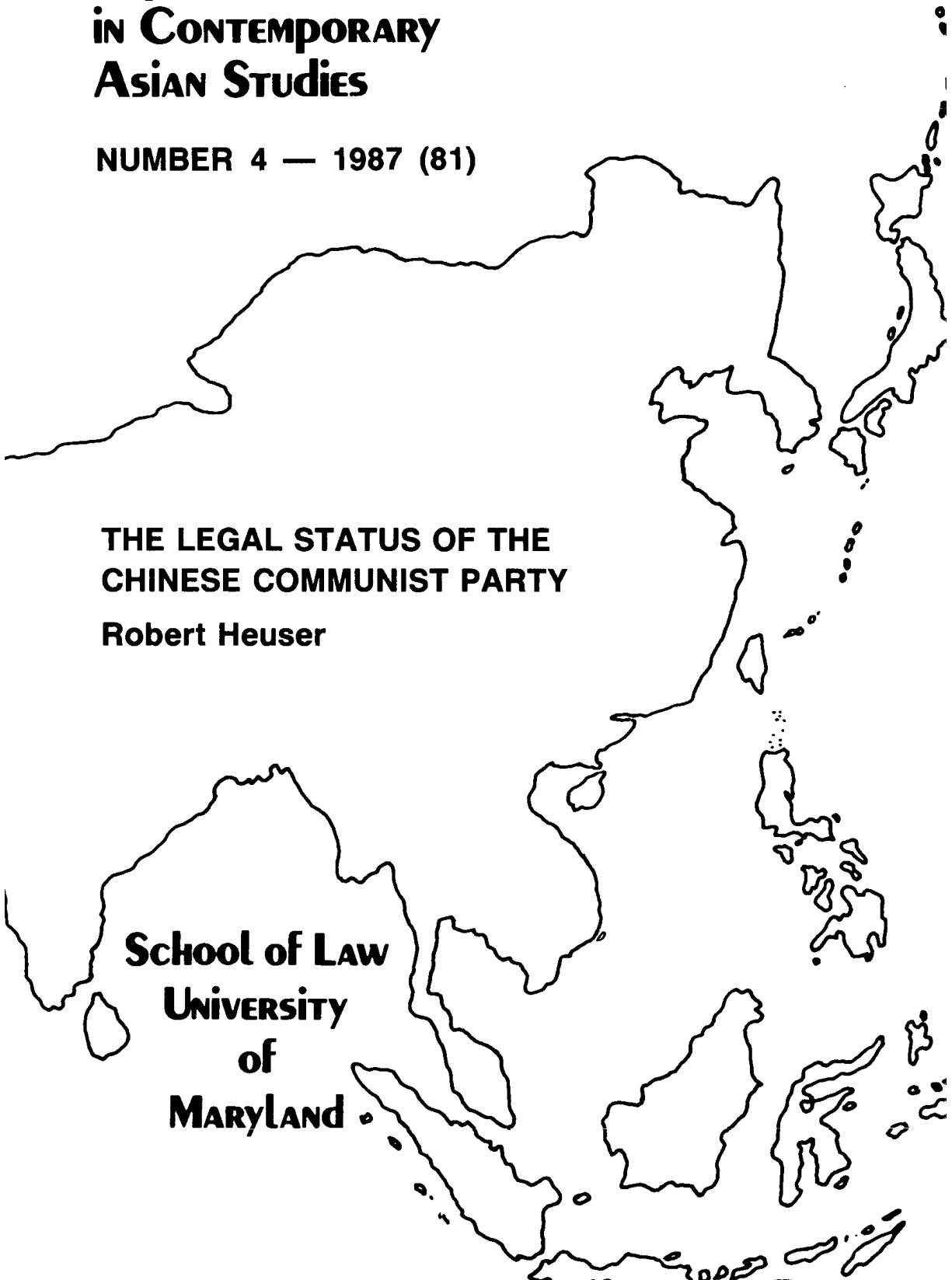
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**THE LEGAL STATUS OF THE
CHINESE COMMUNIST PARTY**

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UNIVERSITY
of
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THE LEGAL STATUS OF THE CHINESE COMMUNIST PARTY*

*Robert Heuser***

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I. INTRODUCTORY REMARKS

A few years ago the question of the status of the Chinese Communist Party (CCP) within the legal system of the People's Republic of China (PRC) would not have been considered a significant one. The situation was characterized basically by a unity of Party and law, without much attempt to conceal it. The "lines" (*luxian*), "directions" (*fangzhen*), "resolutions" (*jueding*) and other forms of expression of the Party's will represented the main body of the legal system. There were only a very few valid standards outside of those produced di-

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rectly by the Party. Criminal cases were as a rule handled by the Party secretaries of the local Party organizations.¹ Consequently the Party Statutes of 1969 and 1973 have no relationship to the state legal order (constitutions, laws, etc.), a situation which today is referred to as having been "legal nihilism" (*falüxuwuzhuyi*).²

Since the end of the 1970s, however, a comprehensive legal system (criminal law, civil law, economic law, administrative law, procedural law, etc.) of various forms (laws, regulations, communications, etc.) has been developing. The Constitution of the state is regarded as its normative foundation (*jiben-fa*). The construction of this normative system has not yet been concluded. Especially in the field of civil law and labor law, adequate legislation is still lacking, and the broad realm of administrative law awaits a complete restructuring.³

An important achievement of the present law reform can be seen in the emergence of a consciousness on the part of both citizens and officials that expressions of the will of the Party do not possess, as such, the quality of law, but rather that the creation of this quality depends on the orderly procedures of state organs.⁴ In his explanation of the draft of the state Constitution, the vice-chairman of the revision committee and chairman of the law-commission of the National People's Congress, Peng Zheng, pointed out: "The opinions of the Party and of the people can only become the law and will of the state when they have been accepted by the National People's Congress or its standing Committee."⁵

Another achievement can be found in the conception which is now recognized, that nobody stands above the law, and that the operations of the Party have to be carried out within the limits set by the law.⁶ The statement in the preamble and in Art. 5 of the state Consti-

1. At a certain time during the "cultural revolution" not only the legal order of the state but also the Party organization did not function; instead, the rule of military had been established.

2. For example: Chen Souyi, "A Review of New China's Research in Law During the Past Thirty Years," *Faxue-yanjiu* (Legal Studies) (hereafter *FXYJ*) 1980, No. 1, at 3.

3. See Liu Tingshou, "On the Strengthening of the Activities in Legislation and Administration of Justice Concerning Administrative Law," *Guangmingribao* (Enlightened Daily) (hereafter *GMRB*) 11.4.1982, where we read: "Important and constantly applied rules of administrative law are almost not existent."

4. E.g., Sun Guohua, "The Relationship between the Policy of the Party and the 'Law,'" *Renminribao* (People's Daily) (hereafter *RMRB*) 24.2.1979.

5. *Beijing-Rundschau* (hereafter *BR*) 1982, No. 19, at 19.

6. Peng Zheng, note 5: "The leadership and the activities of the CP in the life of the State have to be carried out within the limits prescribed by the Constitution and the laws." For a scholarly view, see Zhang Shangzuo, "The Party has to operate within the limits of

tution now in force that "all state organs . . . , all political parties and social organizations . . . and each individual" is to be bound by the Constitution is commented on by a Chinese constitutional lawyer as follows: "What has to be particularly emphasized is, that by the term 'political parties' mentioned therein, the governing party, that is the CCP, is embraced, and that the 'organizations and individuals' mentioned include the Party organizations of all levels and the highest leaders of the Party."⁷

Thus the binding force of law is recognized as an element of the life of the Party: the work of the Party itself is becoming an object of law making. To achieve structural reform, the competences of State and Party have to be separated, the scope of functions of party organizations and State administration methods have to be clarified, and the nature of action and influence of the party life upon the spheres of the State (especially the State economy) have to be regulated. The "Regulations on the work of the Basic Organizations of the Chinese Communist Party in Industrial Enterprises of Ownership by the Whole People" of October 1986, added to this paper as an "Appendix," are an initial result.

In the present article, "Zones of contact" between the CCP and the legal system will only be dealt with to the extent that points of reference within the positive law can be found. Those widely-known facts concerning the privileged or otherwise special position of Party functionaries,⁸ which are not recognizably reflected in positive law, are therefore ignored.⁹

II. THE RELATIONSHIP BETWEEN THE CCP AND THE STATE AND LEGAL SYSTEM

This relationship is based in a general way on the Statute of the CCP of 6 September 1982¹⁰ and the state Constitution of 4 December of the

constitution and law," in: Zhang Guohua (main editor), *Theory and Practice of the Chinese Socialist Legal System*, Xiamen 1986, at 169.

7. Wang Jingrong, "On the Strengthening and Improvement of Leadership of the Party," in Zhang Youyu *et al.*, *Collection of Constitutional Essays*, Beijing 1982, at 44.

8. They are at present openly denounced by cartoonists and letters to the editor appearing in the official press. In one such letter it is asked: "Are children of cadres who beat their teachers not to be disciplined?" (*GMRB* 19.9.1981).

9. Officers of the Chinese air force who have defected to Taiwan have pointed out that until recently members of the CCP were not permitted to have relations (including matrimonial) with persons from groups labelled "reactionary."

10. In English in Simons, White (eds.) *The Party Statutes of the Communist World*, The Hague 1984. Art. 5 III and 5 of this Statute (*zhangcheng*), mention a "party programme" (*gangling*). As far as I know such a document does not exist thus far. But in

same year.¹¹

1. References in the Party Statute to the State and the Legal System

In the preamble of the Party Statute it is pointed out that the CCP “has led the masses of the people of all nationalities of the country” to state-building and social reforms, and that this leadership is to be continued.¹²

The law of the Party as contained in the Statute related to the legal order of the state: membership in the Party requires Chinese citizenship as regulated by the law of 1980 (Art. 10; Party members have to observe the laws of the state, to guard state secrets and state interests (Art. 3 III); the Party organizations adapt to the administrative units of the state (Arts. 18, 24); the primary organizations of the Party have the task, among others, “to safeguard the legitimate rights and interests of the masses” (Art. 32 IV), to ensure that officials observe the law and administrative discipline, and “to see to it that financial workers in their own units, including accountants and other professionals, who are responsible for enforcing laws and regulations do not violate such laws and regulations at the same time, ensuring and protecting their right to exercise their functions and powers independently in accordance with the law and guarding them against any reprisals for doing this” (Art. 32 VII).

Violations of administrative discipline and law by Party members have to be punished through the relevant state organs of the administration and the judiciary. Party members who have “seriously violated criminal law” have to be expelled from the Party (Arts. 38 III, 40 III). In the case of Party members who are subject to internal disciplinary measures, any methods “which contravene the party statute or the laws of the state” are forbidden (Art. 39 IV). The Party commissions for the inspection of discipline adopt decisions in case of violations of the Party statute, Party discipline or the laws and decrees of the state (Art. 44 II).

2. References in the State Constitution to the CCP

The preamble of the Constitution speaks of the “leadership (*lingdao*) of the Communist Party” and the “guidance (*zhiyin*) of Marxism-Len-

February 1980 “Directions of the Central Committee of the CCP for Life within the Party” had been promulgated. (BR 1980, No. 13, at 3ff).

11. In English in *China Daily*, December 6, 1982.

12. Concerning the qualification of this “leadership” see below at part III.

inism and Mao Zedong-Thought." In this way "leadership" and "guidance" are incorporated into the legal order of the state.

In earlier Constitutions (1975, 1978) it was pointed out more directly and not only in the preamble but also in the "General Principles" (Art. 2 I), that the CCP "is the core of leadership of the whole Chinese people."

Under this "leadership" and "guidance" the "socialist legal system is improved." In the preamble it is further pointed out, that "all political parties and public organizations . . . must take the Constitution as the basic norm of conduct and they have the duty to uphold the dignity of the Constitution and ensure its implementation." According to Art. 5 of the Constitution "all . . . political parties and public organizations . . . must abide by the Constitution and the law . . . No organization or individual may enjoy the privilege of being above the Constitution and the law."

Constitutional and other legal acts do not contain any provisions concerning the legal nature of the CCP. Nor is this subject discussed in the relevant literature.

III. THE ROLE OF THE CCP IN STATE AFFAIRS: "LEADERSHIP"

The fundamental notion which applies both to the position of the CCP vis-à-vis the state and within the legal framework of the state itself is that of "leadership" (*lingdao*).¹³ In contrast to the Constitutions of 1975 and 1978, the current Constitution does not contain a "party article" (such as, e.g., Art. 6 of the Soviet Constitution of 1977). The notion of "leadership" is, however, written into the preamble. How may this concept be understood, and how does it take effect in the state and legal system? According to the preamble of the CCP statute, "leadership" means ("most importantly") "political, ideological and organizational leadership," i.e., the party "must guarantee that the state legislative, judicial, and administrative organs (as well as the social organizations) work actively and with initiative, independently, responsibly, and in harmony."

With respect to the functioning of "democratic centralism" (see preamble of the Party Statute: "Adherence to democratic centralism"), "leadership of the Party" means leadership by the top of the Party (Central Committee, its Politburo, its Standing Committee, the

13. For a general description see Harro von Senger, *Partei, Ideologie und Gesetz in der Volksrepublik China* (Schweizer Asiatische Studien, Vol. 5) Bern and Frankfurt-am-Main 1982, 1ff.

Secretariat of the Central Committee and its General Secretary, the chairman of the Military Commission at the Central Committee, the Advisory Commission at the Central Committee and its chairman; and prohibition of any personality cult, according to Art. 10, No. 6 of the Statute).

In carrying out "ideological and political leadership" important Party documents are published in prominent positions in the official gazettes. Some examples may be mentioned:

Mao Zedong's: "On the collectivization of agriculture" *Fagui-huibian* (FGHB Vol. 2, 24 ff.); Zhou Enlai's Central Committee "Report on the question of the intellectuals" of Jan. 1956 (FGHB Vol. 3, 24ff.); the documents of the eighth CCP congress of 1945 (FGHB Vol. 5, 1ff.); Deng Xiaoping's Central Committee "Report on the movement concerning improvement in the working-style" of 1957 (FGHB Vol. 5, 5ff.); Mao's "On correct handling of contradictions within the people" of 1957 (FGHB Vol. 5, 1ff.); the decision of the Central Committee "On the question of establishing people's communes in rural areas" of Aug. 1958 (FGHB Vol. 8, 1ff.); Liu Shaoqi's "The victory of Marxism-Leninism in China" of 1959 (FGHB Vol. 10, 1ff.) etc.

"Organization leadership" is realized by Party organizations within the state organs.¹⁴ Art. 46 of the Party Statute reads in part: "Party members' groups shall be set up in the leading body of a central or local state organ . . ." They "ensure that the Party's principles and policies are implemented." They do not, however, exercise any direct administrative competence. In Art. 33 II it is pointed out: "In . . . government offices at all levels, the primary Party organizations shall not lead the work. Here their task is to exercise supervision over all Party members, including the heads of these offices who are Party members, with regard to their implementation of the Party's line, principles, and policies, their observance of . . . the law . . . They are to assist the office heads in improving work, raising efficiency . . . keeping them informed of the shortcomings and problems discovered in the work of the offices . . ."¹⁵

In a textbook on constitutional law we read the following: "The leadership of the Party vis-à-vis the state power is essentially political, spiritual and directive leadership . . . It does not aim towards a direct order relationship vis-à-vis the government."¹⁶

14. For a concrete example, see Appendix.

15. The fact of the existence of Party organizations within the state bureaucracy seems not to be considered in the Chinese concept of administrative law (see, e.g. Liu Tingshou, note 3).

16. Xiao Weiyun *et al.*, *Outline of Constitutional Law*, Beijing 1982, at 105. This corre-

Direct execution of administrative (state) tasks by Party organs had been practised for a long time, especially in the rural areas. The main reason may have been the shortage of sufficiently qualified personnel, making it difficult to staff a dual hierarchy of Party and state. In 1958 the establishment of the people's communes as a combination of the former *xiang* (district) with the commune administration (as still expressed in Art. 7 I of the 1975 Constitution: "The rural people's commune is an organization which integrates government administration and economic management") sometimes provoked the opinion that amalgamation ought also to occur with the Party organization of the commune. This, however, met with the disapproval of the state and Party leadership. The secret Party directive of 1961 on rural communes (the "Sixty Articles") explicitly stated that the Party organization was not to undertake the work of the commune administration. If not institutional amalgamation, the practice of personal union of the offices of Party secretary and chairman of the commune administration was quite common.

Since the end of the 1970s there have been strong efforts for a decartelization of the offices of the Party and the state bureaucracy.¹⁷ This personnel policy is intended to strengthen the alliance of the Central Committee with the government and the military.¹⁸

In carrying out its "leadership" the Party must act "within the limits prescribed by the Constitution and the law" (preamble, Art. 5 of the Constitution). In his explanations concerning the draft of the Constitution, the Vice-Chairman of the Revision Commission, Peng Zheng, pointed out: "Leadership and activities of the CCP in the life of the state have to be carried out within the limits prescribed by the Constitution and the laws."¹⁹

In striking contrast to this, it was emphasized even in 1978 that one has "to fight against the enemy (i.e. the criminals) in accordance with law;" in doing so, however, "(we must) not let our hands and feet

sponds to the principle which was formulated at the Party Congress of the CPSU (March 1919) in a resolution on the "mutual relationship between Party and Soviets" (see H. Roggemann, *Die Staatsordnung der Sowjetunion*, Berlin 1971, 16: "A mixture of the functions of Party collectives with those of state organs . . . is in no case permitted . . . The Party has to carry out its resolutions through the organs of the Soviets but does not replace them").

17. See *China aktuell* (hereafter *Ca*) 1979, at 549; 1980, at 863.

18. See W. Bartke, P. Schier, "Der 12. Parteitag und die neue Parteiführung," *Ca* 1982, 745 ff., 749 ff. In the military field this personal alliance is particularly strong. All members of the Central Military Commission (a central state organ, Art. 93 of the Constitution) are also members of the Military Commission of the Central Committee. (Chairman of both is at present Deng Xiaoping).

19. *BR* 1982, No. 19.

be bound.”²⁰

Whereas laws establish operational limits, *legislation* itself “occurs under the leadership of the Central Committee of the CCP.” At least the important laws (and of course the Constitution) are “first examined by the Party, and only then are they transferred to the legislative state organs.”²¹ Here it becomes obvious that the constitutional concept of “leadership” embraces the concept of sovereignty, or rather is identical with it.

“Leadership” in the *judiciary*, too, is “leadership through direction, policies, organizations and the legal system of the state” and does not aim at a direct participation in the judicial organs.²²

“Leadership” also indicates an ideologically “correct” concretization and definition of notions used in legal acts, as particularly emphasized by the introductory section of the Criminal Code and the Code of Criminal Procedure.²³ Notions such as “interests of the state” (Art. 51 of the Constitution), “counter-revolution” (Arts. 4, 90ff., 162 Criminal Code; Art. 15 Code of Criminal Procedure), “feudal superstition” (Art. 99 Criminal Code), “disturbance of the socialist order” (Art. 158 Criminal Code), “state secrets” (Art. 186 Criminal Code), “independence of people’s courts” (Art. 4 II Code of Criminal Procedure) etc., when applied through the courts and administrative organs, are concretized in the light of the Party’s doctrine and policies.

“Leadership” thus means the authority of the CCP to set directions for and practice surveillance of all organs of the state (the economy and society), a practice which is not formally reflected by the organizational laws of the state organs.²⁴ In contrast to this it was

20. Statements of the then Vice-Chairman of the CCP, Ye Jianying, in his report on the revision of the Constitution before the Fifth National People’s Congress in March 1978, *BR* No. 11, at 30.

21. See Zhou Xinming, Chen Weidian, “Some Opinions on the Question of Legislative Procedure,” *RMRB* 5.1.1979; see also von Senger note 13, 99ff. This procedure is thus far not regulated in any detail. The recently published Provisional Regulations of the State Council Concerning Procedures for Drafting and Promulgating of Administrative Legal Provisions (Text in: *Zhongguo fazhibao*, May 11, 1987, at 2) do not explicitly refer to the Party.

22. See Zhang Jingjing, Xie Banyu, “Independence of the judiciary and the leadership of the party,” *FXYJ* 1980, No. 2, at 27ff. See also Stanley Lubman “Emerging Functions of Formal Legal Institutions in China’s Modernization,” in: *China Under the Four Modernizations, Part 2* (Selected Papers Submitted to the Joint Economic Committee, Congress of the United States, December 30, 1982) 268.

23. In Art. 1 of the Criminal Code it is pointed out that “the criminal law of the PRC adopts Marxism-Leninism and Maozedong-Thought as its guidance . . .”.

24. For example: The organization law of the state council (central government) of December 1982 (as with the law of September 1954) abstains from any reference to the

pointed out on a constitutional level in 1975: "the National People's Congress is the highest organ of state power under the leadership of the CCP" (Art. 16 Constitution of 1975). "The Chairman of the Central Committee of the CCP commands the country's armed forces" (*ibid.*, Art. 15 II). In the Constitution of 1978 it was stated that the National People's Congress decides "on the proposal of the Central Committee of the CCP" about the nomination of the prime minister (Art. 22, No. 4).

The fact that in the current Constitution "leadership" is only mentioned in the preamble points to the rule that "the spheres of competence of the leading organs of the Party and the political power organs of the state are strictly separated from each other and (that) the principle of the separation of Party politics and state systems is established."²⁵

As early as 1928 Mao Zedong had conceptualized the role of the CCP "to guide the power organs." Regarding the Chinese National Party he added: "one has to avoid the reprehensible practice of the Guomindang to dictate its orders directly to the organs of the government."²⁶

We may thus conclude that "leadership" of the CCP means the submission of the total state function (from planning to legislation, execution and control) to the will of the Party, a will, however, which

CCP. In the GDR, on the other hand, Art. 4 of the law of the Council of Ministers "operates on the basis of the programme of the SED, the resolutions of the Central Committee of the SED . . ." In contrast to the organization laws of the state organs the "leadership" of the CCP is explicitly repeated in the Statutes of the social organizations (e.g., the eight "democratic parties," the trade union).

25. Wang, *supra* note 7, at 40; Lubman, *supra* note 22.

26. Xuanji (*Selected Works*), Vol. I, at 72. A comparison of the relationship, as defined in terms of the law of both parties (the CCP and the Guomindang), to the sphere of the state reaches, however, very different results (neglected by Mao). The CCP asserts the autonomy of the state apparatus, but penetrates it by its "leadership." The Guomindang relied on the three-steps-conception of Sun Yatsen, according to which the second step—the period of "tutelage" government (after the period of military and before that of constitutional government)—is characterized by the rule of the Guomindang. Consequently Art. 30 of the Constitution for the period of tutelage government of June 1931 pointed out: "During the period of tutelage the National Congress of the Guomindang represents the National Assembly in exercising the central governmental power." (Chen Hefu, ed., *Classified Collection of Chinese Constitutions*, Beijing 1980, 450). After the period of constitutional government had officially been entered in 1947, party politics had to be carried on within a parliamentary system, and state and Guomindang had to be separated. Thus the Assembly of High Judges decided in 1952 (in Taiwan) that "the functionaries of the Guomindang had to be regarded as state officials. (See my article, "The interpretation of the Constitution by the Assembly of High Judges in Taiwan" (in German), in *Festschrift Karl Büniger*, Wiesbaden 1981, at 266).

has to take form in the legal system of the state to become "state-effective." The CCP should not be directly involved in running the life of the state (the economy and the society), but rather should concentrate on policies and ideological work. Probably in view of this concept of "leadership," the General Secretary of the CCP, Hu Yaobang, pointed out recently: "Ours is not a one-party dictatorship but a people's democratic dictatorship under the leadership of the Communist Party."²⁷

IV. PARTY MEMBERSHIP AND THE PARTY IN SOME FIELDS OF THE LEGAL SYSTEM

1. Constitutional Law

The joint legislation of the State Council and the Central Committee (the "joint decrees") seems to represent—in contradiction to the concept of "leadership" outlined above—a direct participation of the Party in an area of competence of the state. Important measures are enacted by both the Central Committee and the State Council (in this order usually as *zhishi* (instruction), sometimes as *guiding* (regulation) or *jueding* (resolution). A legal basis for this joint legislation cannot be found. The official gazette contains for the four years from 1954 to 1957 thirteen of such joint acts out of a total number of about 650 legal acts. For the following six years, during which the development of the legal system stagnated, there exist 38 out of a total of about 500 legal acts. As examples the following may be mentioned:

"Urgent instruction concerning fire protection of woods," April 1956 (*FGHB* Vol. 3, 61ff.); "Resolution concerning the overcoming of illiteracy," March 1956 (*FGHB* Vol. 3, 485ff.); "Instruction concerning activities in the field of foodstuffs," Nov. 1956 (*FGHB* Vol. 4, 314 ff.); "Instruction concerning avoiding of migration of rural populations," Dec. 1957 (*FGHB* Vol. 6, 229ff.).

This practice continues after the promulgation of the current Constitution, which is careful in separating the functions of the Party and the state. Examples are:

"Communication concerning the establishment of a scientific-technical leadership group at the State Council" *Zhonghua renmin-gongheguo guowuyuan-gongbao* (*Gb* 1983, No. 2, 60ff.); "Resolution on strengthening of publication work" (*Gb* 1983, No. 13, 563ff.); "Res-

27. *Xinhua News Agency* 25.1.1984, at 3. The newly established Chinese political science views the "leading role of the Party" as one of its most important objects for research. See Zhao Boaxu, "Die Wiederbelebung der Politologie in China," in: *China Report* (Vienna) No. 76/1984, at 20.

olution on resisting grave economic criminality," April 1982 (*BR* 1982, No. 17, 8ff.). (See also the "Regulations" in the Appendix).

Chinese legal literature does not give any information concerning the qualification of this form of legislation.²⁸ Viewing the dominating tendency to separate the competences of the state from those of the Party, it can be assumed that in the case of the "joint decrees," the Party does not intend to behave as legislator in contradiction to the Constitution and to exercise state competence in a formal way. The "joint decrees" may rather be seen as *mixta composita* by which the highest organ of the Party addresses lower organs and Party members and the state council addresses state organs.²⁹ The same intention seems implied in the explanatory report of the *BR* regarding the joint resolution concerning economic crime. According to this resolution "the highest authorities of China (i.e., the Central Committee of the CCP and the State Council) call upon the leadership organs of all levels" to fight against economic crime.³⁰

Art. 33 II of the state Constitution states: "All citizens of the People's Republic of China are equal before the law." It is emphasized today that this principle also applies to all Party members. However, they do not enjoy freedom of religion as guaranteed by Art. 36 of the Constitution. "The policy of religious freedom," it is said, "only applies to those Chinese citizens who are not members of the CCP. As a member of a Marxist party one has to be an atheist."³¹ By joining the party the citizen is set in an especially intensive relationship to the aims envisaged by the party. The only kind of religious freedom that can be exercised in conformity with the "theory of scientific socialism" (Party Statute), is the freedom to accept atheism. Limitations on freedom of expression for Party members which go beyond those provided for the Constitution, may be found in the Party Statute (see Art. 15 III) and other Party documents such as, e.g., the Directions of the Central Committee for life within the Party of February 1980).³²

In the preamble of the law on regional autonomy adopted by the National People's Congress in May 1984 the "regional autonomy of national minorities" is described as "the basic policy which the Chinese Communist party applying Marxism-Leninism [uses] to solve the

28. It is mentioned as such without further qualification in Ying Songnian, Zhu Weijiu, *General Treatise on Administration Law*, Beijing 1985, at 434.

29. See also D. Frenzke, *Recht in Ost und West*, 1975, 200.

30. *BR* 1982, No. 17, at 8.

31. *BR* 1982, No. 24, 3ff.

32. *BR* 1980, No. 13.

problem of national minorities in our country.”³³

2. Administrative Law

Administrative rules and regulations, jointly promulgated by the Party and administrative agencies of the State are regarded as “important sources of Chinese administrative law.”³⁴ The Regulation on Academic Degrees of January 1980 (Art. 2) does not contain a specific reference to the Party, but it provides a typical statement concerning the special position of the “leadership,” which is at the basis of the whole legal order: “Each citizen who supports the leadership of the CCP . . . and possesses a solid academic background may . . . apply [for the awarding of] a corresponding academic degree.” Membership in the CCP is not required, since the “support of the leadership of the CCP” can also be shown by being a member of one of the “democratic parties” or another mass organization. According to art. 4(2) of the Provisional Regulations of the State Council Concerning Procedures for Drafting and Promulgating of Administrative Legal Provisions of April 21, 1987, the State Council has to comply not only with “the constitution and the laws” but also with “the line, directions and policies of the Party and the State” when drafting administrative legal norms.³⁵

The structural reform of the central state organs, commenced at the beginning of the 1980s, is taking place simultaneously with similar reforms of the Party organs.³⁶

3. Election Law

According to Art. 26 II of the Election Law of 1 July 1979 (as amended 10 December 1982) the CCP, as well as each democratic party, each people’s organization and groups consisting of at least three citizens, has the right to propose candidates for election to the people’s congress.

4. Criminal Law

The expression “state official” (*guojia-gongzuorenyuan*) in the Criminal Code of 1979 (Arts. 93, 157, 166, 185ff.) embraces Party functionaries. In Art. 83 it is pointed out that: “State officials as prescribed in the present law refer to personnel of all state organs, enterprises and

33. Text in *RMRB* 4 June 1984.

34. Ying, Zhu, *supra* note 28, at 44 (with examples).

35. Text in *Zhongguo Fazhibao* May 11, 1987, at 2.

36. *BR* 1982, No. 28 at 17; No. 9, at 3.

business units and others who engage in official business in accordance with the law.” It can be assumed from the notion of “leadership” that among those who engage in “official business” (*gongwu*) are Party officials.

“Official documents” in the sense of Art. 167 (forgery etc.) are not only those of state authorities but also of “people’s organization” (*renmin-tuanti*) which embraces Party organizations. “State secrets,” in the sense of Art. 186, include Party secrets.³⁷ Violations of criminal law have consequences concerning disciplinary measures of the Party (Art. 40, Party Statute), but “acts which violate the Party discipline cannot be prosecuted in terms of criminal law.”³⁸ From the Party Statute it can be seen, however, that in the case of criminal acts, a criminal law penalty cannot be replaced by measures of Party discipline, as occurred in earlier years.³⁹

5. Labor Law

According to Art. 37 II of the Party Statute, the Party officials retire in compliance with the state regulations. The practice of being in office for life was abolished.⁴⁰ Detailed regulations concerning a new pension system have not yet been promulgated. Concerning the policy of employment, it is emphasized that not all the leading positions in the state bureaucracy have to be filled by Party members.⁴¹

6. Civil Law and Law of Civil Procedure

Although it may be highly debatable, the CCP and its organizations can be regarded as juridical persons according to Chinese law. However, they are not required to register with a state authority (one of the general conditions required for recognizing legal capacity).⁴² The other legal characteristics of a juridical person—such as the existence

37. See *BR* 1982, No. 30, at 3.

38. Peng Zheng, in his National People’s Congress report on the draft of the criminal law, June 1979 (*BR* 1979, No. 28, 11).

39. See the case mentioned in F. Münzel, *Das Recht der VR China*, Darmstadt 1982, 72, note 16.

40. *BR* 1980, No. 46, at 20; 1982, No. 9, at 3.

41. See *BR* 1982, No. 18, at 17.

42. According to Art. 2, No. 1 of the Provisional Measures for the Registration of social organizations of 1950 (*Faling-huibian*, Vol. 1, 159ff), which are still in force (republished in *Gongangfagui-huibian* 1959-1979, Beijing 1980, 465ff), “all democratic parties and people’s organizations which have joined the Political Consultative Conference of the Chinese People” do not belong to the organizations which have to register with a state authority. The CCP, a “people’s organization” (*renmin-tuanti*) is a member of the Conference (i.e., the top organization of the united front).

of by-laws, property independent from the organization's members,⁴³ the capacity to sue—all of these exist.⁴⁴ The capacity of CCP organizations to sue also results from Art. 44 II of the Code of Civil Procedure: "Business units, authorities and organizations can be parties in civil actions; in this case there is legal representation by the principal responsible person of the unit."⁴⁵

It is understood as a matter of course that Party organizations take part in general transactions regulated by civil law.

7. International Law

It is clear that the Party has by virtue of its "leadership" the authority for setting general directives in the field of external relations. Substantive foreign relations power is possessed by the top organs of the Party. Here, too, however, the substantive power is not reflected in the formal procedures. Moreover, neither a practice according to which the Chairman of the Central Committee of the CCP ("chairman of the Party") or, after this office was abolished in 1982, the General Secretary of the Central Committee of the Party, signs international documents can be found in China.⁴⁶

During his visit to Japan in November 1983, the Secretary General Hu Yaobang acted like a chief of government or of state and was accepted as such by the Japanese (e.g. his main interlocutor was the Japanese prime minister; his audience was with the Emperor and he spoke before the parliament).⁴⁷ This corresponds with the view that also outside of the group of socialist states the General Secretaries of

43. E.g. members' fees and the ownership of publishing houses, recreation centers, etc.

44. The promulgation of the Civil Code is expected in the near future. Recently published textbooks on civil law deal with the juridical person, without, however, mentioning the CCP. See for instance Tong Rou and others, *Outline of Civil Law*, Beijing 1982, at 40ff. In a letter of 5 July 1984 from New York Prof. Hazard reported the statement of a Beijing Law School faculty member concerning the question whether the CCP is considered of being a juridical person, as follows: "There are now two views on this topic: (1) the CCP cannot be a legal person because it is above the law, and (2) it is a legal person even though no provision of the law says so. He said that he took view No. 2."

45. From Chinese colleagues I have learned that in cases of damage, in which CP organizations are involved, settlement would always be outside the courts.

46. With the exception of cursory hints in the Constitution (Art. 67 No. 14; Art. 81f) the modalities of the conclusion of treaties are not regulated by law. In the international law literature, the participation of party organs is not mentioned (see e.g. Wang Jieya (main ed.), *International Law*, Beijing 1981, at 311ff).

47. In the Chinese press the visit was characterized as a "state visit" (*BR* 1984, No. 5/6, at 5): In the Japanese press it was referred to as an "official visit" (*Japan Times* November 24, 1983), and the visitor was described as an "official guest" (*kōhin*) (*Asahi-shimbun* November 24, 1983).

ruling communist parties are recognized as having an international legal position of highest representation with respect to their countries.⁴⁸

V. CONCLUSIONS

“Zones of contact” between the CCP and the state and legal order are consequences of the “leadership” of the Party. Because of the principle of separation between the spheres of the Party and the state (principle of the autonomy of the state apparatus), they can only be found in the legal order as such as a confirmation of the integration of the CCP within the legal system. The CCP and its members are subject to law.

This submission under law concerns a legal system which came and comes into existence under the “leadership” of the top-ranking Party organs. The constitutional concept of “leadership” includes the authority to prepare legislation. The legislative procedure as regulated by the Constitution follows this preparatory stage. It involves giving legislative form to resolutions already adopted as binding. The subordination to law is thus in fact reduced to the observance of certain norms of procedure.

It would neither correspond with the Chinese theory of state and the normative reality of the state law (*Staatsrecht*) nor—and this is more important—serve an understanding of the Chinese *res publica* to characterize the CCP or its top organs as state organs (even “in a broader sense”). Chinese state law only recognizes four categories of state organs: those of the state power, the state administration, the judiciary and the procuracy. The inclusion of top organs of the CCP within the state organs, which the Party has the function to “lead”, would not conform to reality. The role of the Party would be minimized. The legal position of the top ranking organs of the Party and their relationship to the state apparatus can only be grasped adequately by applying the concept of sovereignty. Although this is not revealed in the legal order in any detail,⁴⁹ it is, however, construed as the basis of the whole state and legal order by the concept of “leadership.” By means of the authority to initiate enactments or to revise the Constitution, the whole legal order is at the disposal of the top organs of the Party.

Consequently, the Party organizations and the state apparatus

48. *Völkerrecht*, part. 1, Berlin (East), 419.

49. As for example, by a formalized right of the Central Committee to initiate legislation. Such a right is provided for by the rules of the Romanian National Assembly.

may rather be conceived of as executive organs of the sovereign. The legal relationship between sovereign Party and state organs may be accurately designated as a "trusteeship-like mandate relationship."⁵⁰

Turning to the question of "models," it seems likely that China will return to the Soviet model of the so-called Stalin Constitution of 1936: separation of the apparatus of the Party from the state, the absence of "mixed" organs (as is the case particularly in Romania), integration of the Party organization and the Party members within the legal order, "leadership" of all spheres of state and society by the Party.

The interesting element of the Chinese situation, the emphasis on the submission to law of even the highest organs and members of the Party, should at present be regarded as a declaration of good intentions resulting from bad experiences during the preceding one or two decades. This element, however, will have to grow in substance through legislation and practice in the life of courts before it can really be considered to be an expression of a specific "Chinese" model.

50. This term is used with regard to the Soviet Union in S. Braga, *Osteuropa-Recht*, Vol. 8 (1962), 20ff.

APPENDIX

Regulations on the Work of the Basic Organizations of the Chinese Communist Party in Industrial Enterprises of Ownership by the Whole People

(Promulgated by the Central Committee of the CCP and the State Council, Oct. 15, 1986)*

1. Chapter: General Principles

Art. 1

These regulations are promulgated in order to comply with the demand for reform of the structure of the leadership of industrial enterprises owned by the whole people, to improve and to strengthen the leadership of the Party in the enterprises, to develop the function of guaranty and control by the party organizations and to advance the development of the socialist enterprises.

Art. 2

§ The Party organizations in the enterprises have to adhere to the Four Basic Principles, in order to carry out the general tasks and aims of the Party in the new period, to concentrate on the practical development of the production management and the reform of the economical structure, to establish the socialist material and spiritual civilization, to guarantee the implementation of the system of responsibility of the factory director and to advance the completion of the production management and of other tasks.

Art. 3

The basic committee of the Party within an enterprise (in the following: Party Committee) exercises towards the enterprise ideological-political leadership, i.e. it guarantees and supervises the thorough implementation of the different lines, directions and policies of the Party and the State, supports the mass organizations in developing their work independently and responsibly, carries out scrupulously its ideological-political activities, displays the function of the Party organizations as bastions of struggle and the role of Party members as avant-garde and model, in order to guarantee the development of the enterprise in socialist direction.

* Text in Zhongguo fazhibao, Oct. 22, 1986, at 2, 4 (Translation by Robert Heuser).

Art. 4

The Party Committee of an enterprise must actively support the factory director in his responsibility for making decisions in business management and giving uniform instructions concerning production activities, coordinate closely with the enterprise administration, display the functions of the labor union and the communist youth league, cooperate harmoniously and undertake joint efforts to manage well the socialist enterprise.

2. Chapter: The Party Committee of the Enterprise**Art. 5**

The Party Committee of the enterprise constitutes itself by elections according to the provisions of the Party Statute; re-elections take place in due time. The Party Committee is answerable vis-a-vis the plenary assembly or the assembly of representatives of Party members. The Party Committee must carry out scrupulously the decisions of the plenary or representative assembly.

Art. 6

The Party Committee has to adhere to the correct political direction, to implement scrupulously the line, directions and policies of the Party, to serve the people with heart and soul, to associate closely with the masses, to strengthen the Party spirit, to be honest and sincere, to be well versed in production management and must be composed of energetic Party members.

The secretary of the Party Committee should be equipped with comparatively high theoretical and political skills and qualities of organization and leadership; he should be rich in reform spirit, possess a certain degree of experience in Party work, understand ideological-political work and be able to unit the comrades.

Art. 7

In general the Party secretary of the enterprise does not concurrently function as factory director. In small-scale enterprises these functions can be separated or exercised concurrently by one person. The Party Committee of the enterprise establishes efficient working organs and an unequivocal responsibility system.

Art. 8

The main tasks of the Party Committee of an enterprise are as follows:

- (1) To guarantee and supervise the thorough implementa-

- tion of the various directions and policies of the Party and the State;
- (2) to carry out the ideological and organizational construction of the Party in the enterprise and to reform the working style;
 - (3) to support the factory director in the realization of the aims of his term of office and in the uniform instructions concerning production management;
 - (4) to carry out ideological-political work within the staff and labor force;
 - (5) to strengthen ideological-political leadership towards the mass organizations and do well its work among the masses.

Art. 9

The Party Committee of the enterprise, in accordance with the line and the policies of the Party for cadres must carry out measures of education, training, investigation and supervision toward the cadres of all levels of the enterprise. Concerning the vice-director and responsible persons in the economic and technical spheres nominated by the factory director, and concerning the plan for selecting the personnel for the intermediate management, the Party Committee of the enterprise has actively to advance its opinions and proposals.

Art. 10

The Party Committee implements the principle of democratic centralism; within the Committee democracy must be expanded, a healthy political life has to be established, and organization as well as discipline have to be strengthened.

Art. 11

The Secretary of the Party Committee assumes the routine work of the Party Committee. He organizes the implementation of the decisions of the Party Committee and examines the circumstances of that implementation; he is the first in carrying out democratic centralism and party discipline; he establishes well the leadership group of the Party Committee and the basis for discovery problems and solutions to problems.

Art. 12

The Party Committee in improving its working method and working style should emphasize the following aspects:

- (1) To adhere to the reform, to change conceptions, to

- scrutinize actively how the functions of guaranty and supervision are to be developed;
- (2) to dare to say the truth, to adhere to principles, to proceed according to reality, to strive for efficiency in work;
 - (3) to penetrate into the realities of life, to undertake inspections and research, to grasp incessantly new situations, to solve new problems, to summarize and propagate new experiences;
 - (4) to display the good traditions and the working style of the Party, to struggle hard, to unite with the masses, to set a good example, to separate clearly public and private, to resist self-assertively any kind of unhealthy tendency.

Art. 13

The party organizations of the workshops implement scrupulously, under the leadership of the Party Committee, the directions and policies of the Party; carry out the decisions of the Party Committee and the instructions of the factory administration, strengthen the education and guidance of the party members, strengthen the ideological-political leadership of the union and the Communist Youth Organizations in their own workshops, undertake well the ideological-political work vis-a-vis the staff and working force closely with the persons responsible for administration, strengthen unity and display broadly the functions of guaranty and supervision.

The party organizations of the factory offices provide the party members and cadres with education and supervision, undertake well the ideological-political work and guarantee the completion of the several tasks.

Art.14

The Party Committee of the enterprise grants awards and rewards to party members who have distinguished themselves by producing outstanding achievements; those party members, who have caused damage by neglecting their duties, are to be criticized, and those who have violated party discipline have to be dealt with strictly.

3. *Chapter: Guaranty and Supervision by the Party Committee*

Art. 15

Guaranty and supervision are important duties of the Party Committee of the enterprise. The Party Committee must carry out with a positive attitude guaranty of and supervision towards the whole pro-

cess of economic activity of the enterprise. The Party Committee must actively support the factory director in deciding important questions concerning production management of the enterprise and guarantee realization. If the Party Committee holds a different opinion concerning a decision of the factory director, it should immediately advance it and report to the higher authorities or party organization.

Art.16

The main contents of guaranty and supervision are as follows:

- (1) The socialist direction of the production management of the enterprise;
- (2) the overall enjoyment of democratic rights by the staff and the labor force of the enterprise;
- (3) the correct treatment of the relation of interests between state, enterprise, staff and labor force;
- (4) observance of discipline and law by the enterprise, protection of the interests of the state and the lawful rights and interests of the enterprise;
- (5) the correct implementation of the several directions and policies of the Party by the enterprise and the factory director.

Art. 17

The main methods of guaranty and supervision are as follows:

- (1) To study scrupulously the directions, policies, laws and regulations of the Party and the State by the party members and the cadres of the organizations, to display the role of the party members as avant-garde and model;
- (2) to listen at fixed times to the work report of the factory director and to advance opinions and suggestions;
- (3) to strengthen the discipline of investigation work;
- (4) to improve the system of organized life of the party, to practice criticism and self-criticism;
- (5) to implement the several forms of formal cadre supervision.

4. *Chapter: Education and Guidance of Party Members*

Art. 18

The party organizations of the enterprise have to instruct the party members in Marxism-Leninism and Maozedong-Thought, in the line,

the directions, policies, circumstances and the tasks of the Party, in basic knowledge on and ideals of as well as in the discipline of the Party. In educating the party members there must be developed the willingness to make sacrifices for the cause of communism, the scrupulous fulfilment of the duties of party members, the strengthening of the sense of duty, as well as the principles to serve with heart and soul the people, to subordinate individual interests to the interests of the Party and the people, to take the lead in assuming hardship, to be the last in enjoying the comforts of life and to display the role as avant-garde and model.

Art. 19

The party organizations must regularly ascertain and to investigate the ideological situation of the party members and to assist the party members in solving their ideological questions and practical difficulties.

The party members must regularly report to the party organizations about the ideological and working situation, they have to undertake well the ideological-political work and strive for the fulfilment of the several tasks entrusted to them by the party organization.

Art. 20

[The party organization must] promote the work of recruiting new party members. [It must] train and supervise activists, adhere to the preconditions for party members, carry through the proceedings for joining the Party according to the provisions of the Party Statute, guarantee the quality of new party members. [It must] strengthen education and examination of candidates for party-membership and discuss in due time the question of acquiring formal party-membership.

Art. 21

To improve the system of organized party life the members of the Party Committee take part in the activities of their relevant party group; moreover, they hold semi-annual meetings of democratic life (minzhu shenghuo hui). The party cells hold quarterly at least one plenary meeting of organized Party life (zuzhi shenghuo hui) and arrange at least one party course. The leading cadres among the party members have to take part in the activities of the Party with particular initiative and as common party members.

Art. 22

To scrupulously apply the working style of the Party all party members, especially the cadres among them, must adjust their expressions

and behaviour self-consciously to the standards and norms of a party member and fight against all kinds of violations of party discipline and the law of the State. The Party Committee must strengthen its leadership of the work of discipline investigation, carry out strictly party discipline, protect the severity of party discipline, regularly instruct the party members in respecting discipline and observing the law, and in order to implement party discipline and to fight against unhealthy practices, select able comrades for discipline investigation work. Party members who violate discipline must be dealt with immediately.

5. Chapter: Ideological-Political Work

Art. 23

The ideological-political work of the enterprise must serve the general tasks and aims of the party, take place in close connection with economic work, display extensively the initiative, activity and creativity of staff and labor force and eagerly establish a staff and a labor force which meets the demands of having ideals, having morals, having culture and having discipline.

Art. 24

The fundamental tasks of ideological-political work are as follows: To propagate the Four Basic Principles and the directions and policies of the Party, to arrange for the whole staff and labor force an ideological education on patriotism, collectivism, socialism and communism, to arrange an education of ideals, discipline, democracy, the legal system and the revolutionary tradition of the working class, to resist subversion by corrupt thinking and raise incessantly the ideological-political quality of staff and the work force and thus meet the demands of the establishment of the Four Modernizations.

Art. 25

To display the best traditions of ideological-political work of the Party and to summarize incessantly and apply creatively the experience of ideological-political work carried out under new circumstances: To adhere to the direction to pursue education mainly by means of persuasion; to combine with the ideological-political work the concern for the life of the masses and the solution of practical problems; to pay attention to doing well ideological-political work in production management; the ideological-political work must be based mainly on commendation, encouraging the advanced, helping those who fall behind, applying vivid methods and striving to increase the effect of ideological-political work.

Art. 26

The Party Committee has to pay attention to strengthening the establishment of the troupe of cadres for political work and to development of their functions; it has to lay stress upon the selection and training of cadres for political work and to take care of their thinking, work, study and conduct of life.

Cadres for political work and administrative cadres must in all regards be placed on the same footing.

6. *Chapter: (The Relationship of the) Party Committee to the Assembly of the Representatives of Staff and Labor Force and to Mass Organizations*

Art. 27

The Party Committee conducts ideological-political leadership vis-à-vis the assembly of the representatives of the staff and labor force and guarantees to the assembly the exercise of its fixed powers; the Party Committee propagates by means of this assembly the line, directions and policies of the Party, realizes through the party members its role as avant-garde and model of the assembly and transforms the directions and policies of the Party into self-conscious action of the masses; it incessantly educates the staff and labor force to develop their sense of responsibility as their own masters and supports and guides the representatives of staff and labor force to use correctly their rights and fulfill correctly their duties.

The Party Committee by means of the assembly of representatives of staff and labor force listens to and takes up the opinions of the masses and improves incessantly the work and the work style of the Party.

Art. 28

The Party Committee has to strengthen the ideological-political leadership of the mass organizations, to discuss and to study at appropriate times important problems concerning work with the mass organizations, to support the mass organizations in their independently responsible work and to display extensively all functions.

7. *Chapter: Supplementary Principles*

Art. 29

These regulations are in principle to be applied to enterprises of ownership by the whole people in fields such as traffic and transportation, post and telecommunications, mining, construction, agriculture, forestry and water resources projects.

Art. 30

Responsibility for the interpretation of these regulations lies with the Organization Agency (zuzhi-bu) of the Central Committee of the Chinese Communist Party.

Art. 31

These regulations become effective on October 1, 1986.

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